SUPREME COURT, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-716

NATIONAL AUTO BROKERS CORP., FRANK MAIORANA, ANTHONY MAIORANA; RALPH AJELLO, as Administrator of the Estate of E. LOUIS JAMELE, Deceased; NABCOR OF EAST NEW YORK, INC., and ALFRED J. YOUNG, SR. d/b/a A.J. YOUNG, SR. AUTO SALES,

Petitioners,

-against-

GENERAL MOTORS CORPORATION, FREDERIC G. DONNER, JAMES M. ROCHE, BOB BAIN CHEVROLET, PAUL BATT BUICK, INC., GLEN CAMPBELL CHEVROLET, INC., HAMISTER-GILLOGLY CHEVROLET, INC., PARAGON OLDSMOBILE, INC., NIAGARA FRONTIER AUTOMOBILE DEALERS ASSOCIATION, INC., and GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 30, 1978

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The Court of Appeals:	

(i) has decided important questions of federal law which have not been, but should be, settled by this Court (issues I and II below);

(ii) has decided a federal question in a way in conflict with applicable decisions of this Court (issue III below); and

(iii) has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision (issues I and II below).

I. The district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GI President and GI Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GI, GMAC, GM directors, and a top GI management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this

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action, without disclosing this relationship (which was known at all times to the GI defendants' attorneys) 49

II. The 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in the review of the record and rendering of the Court of Appeals' decision 56

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second

Circuit, rendered in this severed action on March 20, 1978.

OPINIONS BELOW

The bench decision of December 6, 1978 by the District Court for the Southern District of New York (Griesa, J.) is unreported except in part at 1976-2 Trade Cas. ¶61,211 and is reproduced in whole in Appendix A (in accompanying volume). The opinion of Circuit Judge Mansfield of the Second Circuit, decided March 20, 1978, is reported at 572 F.2d 953 and is reproduced in Appendix C.

Other opinions rendered by the District Court and not included in the Appendix are:

1. Memorandum and Order dated May 27, 1971 (Frankel, J.);
2. Opinion # 37731 filed June 17, 1971 (Cooper, J.), reported at 332 F. Supp. 280;
3. Opinion # 37956 filed October 20, 1971 (Gurfein, J.), reported at 1971 Trade Cas. ¶73,726;
4. Endorsement and Order filed October 20, 1971 (Ryan, J.), reported at 1971 Trade Cas. ¶73,729;
5. Memorandum # 39269 filed March 5, 1973 (Griesa, J.), reported at 1973-1 Trade Cas. ¶74,405;
6. Opinion # 39745 dated August 3, 1973 (Griesa, J.), reported at 60 F.R.D. 476;
7. Memorandum dated November 23, 1973 (Griesa, J.);
8. Opinion #40560 filed April 5, 1974 (Griesa, J.), reported at 376 F. Supp. 620;
9. Memorandum # 40582 dated April 12, 1974 (Griesa, J.), reported at 1974-1 Trade Cas. ¶75,040;
10. Opinion # 41280 filed October 10, 1974 (Griesa, J.), reported at 1974-2 Trade Cas. ¶75,281;
11. Memorandum, April 11, 1977 (Griesa, J.); and
12. Memorandum Decision # 45084 dated September 14, 1976 (Griesa, J.).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit affirming the judgment of the District Court was made and filed March 20, 1978. See Appendix C, p. 99a. Plaintiffs' petition for a rehearing en banc was denied by two orders each dated and filed August 29, 1978. See Appendices D and E, pp. 122a and 124a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are:

I. Whether the district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GM President and GM Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GM, GMAC, GM directors, and a top GM management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this action, without disclosing this relationship (which was known at all times to the GM defendants' attorneys).

II. Whether the 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in the review of the record and rendering of the Court of Appeals' decision.

III. Whether the courts below erred when directing (or affirming) a verdict against petitioners and holding there was insufficient evidence to support any jury finding of illegal group boycott ("blacklist") or illegal "whitelist" by any of the 10 defendants as part of an horizontal agreement to fix the retail prices of new cars and prevent competition by "auto brokers".

STATUTORY AND RULES PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part as follows:

> "Every contract, combination or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal...."

Section 15 of the Sherman Act, 15 U.S.C. § 15, reads in pertinent part as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court...."

Section 144 of Title 28, U.S.C., entitled "Bias or prejudice of judge", provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 455 (unamended) of Title 28, U.S.C., entitled "Interest of justice or judge", provided:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, ... or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Section 455 (amended effective December 5, 1974) of Title 28, U.S.C., entitled "Disqualification of justice, judge, magistrate, or referee in bankruptcy", reads in pertinent part as follows:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter....; * * *

"(4) He knows that he, individually ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; * * *

"(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pretrial, trial, appellate review, or other stages

of litigation; * * *

"(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser or other active participant in the affairs of a party. * * *"

Section 1254 of Title 28, U.S.C., entitled "Courts of Appeals; certiorari; appeal; certified questions", reads in pertinent part as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

Section 1337 of Title 28 U.S.C., entitled "Commerce and anti-trust regulations", reads:

"The district courts shall have original jurisdiction of any civil action

or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Section 0.14 of Part I of the Second Circuit Rules, entitled "Quorum", reads in pertinent part:

"(b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at his request*, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate

* Emphasis supplied.

another circuit judge to sit in place of the judge who has become unable to continue or has been relieved. He shall advise the parties of such designation, but no further argument will be had or briefs received unless otherwise ordered."

Rule 50(a) of the Federal Rules of Civil Procedure, entitled "Motion for a Directed Verdict: When Made; Effect", reads in pertinent part:

"* * * A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

Canon 3C(1) of the Code of Judicial Conduct for United States Judges reads in pertinent part:

"A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned..."

Informal Decision 594 of the American Bar Association Ethics Committee, dated October 10, 1962, entitled "Judge Sitting in Case Where Former Firm is Counsel", reads in relevant part:

"With your letter of September 12 you advise that ever since you were elected Associate Justice of the Supreme Court of Arkansas in 1948, it has been your practice not to take part in cases wherein the law firm of which you were a former member appears as counsel, that even though not actually disqualified in such cases, you have felt that the losing lawyer or litigant might not think the Court was wholly unbiased, particularly in a case where the Court was divided and you might cast the deciding vote in favor of your former partner's client. * * * The following Canons of Judicial Ethics might appropriately be referred to:

"'Canon 4. A judge's official conduct should be free from impropriety and the

appearance of impropriety; ....'

"'Canon 13. ... he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.'

"'Canon 26. ... It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.'

* * *

"We give you this background of the Opinions of the Committee so that you will know our approach to these problems.

"There is no Canon of Judicial Ethics which would preclude a judge from sitting

in a case merely because his former firm is counsel in such case. However, the Committee feels that good taste and desire to avoid any seeming impropriety might cause a judge to decline to sit in the following classes of cases where his former firm is counsel:

"(a) Where the case was in the firm at the time he was a member, or

"(b) Where a regular client of the firm at the time he was a member is a party to the case; * * *

"One member of the Committee would omit (b) from our opinion, and expresses the view that there is no more reason for a judge to recuse himself in such a situation than where a personal friend is involved.

"Our Committee also feels that there would be no seeming impropriety or lack of good taste in your sitting in other cases,

particularly after the lapse of several years. Your former firm and its clients, just as in the case of other clients, are entitled to the benefit of your judgment on the court on the cases presented, unless there is disqualification or some consideration of the character indicated above which would cause you to decline to sit. In the final analysis it must be left to the good judgment and conscience of the individual judge."

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction

The basis for federal jurisdiction in the district court is §§ 1 and 15 of the Sherman Act, 15 U.S.C. §§ 1 and 15, and 28 U.S.C. § 1337.

2. Procedural Background

The original action was filed in the District Court for the Southern District of New York on December 10, 1970. Judge Griesa was appointed to the bench in late 1972 and he was immediately

thereafter assigned this action for all purposes. During 1973, Judge Griesa denied petitioners' motion for a preliminary injunction and later denied petitioners' motions to establish various alleged classes, including one defined to include GM's franchised dealers. Plaintiff National Auto Brokers Corp. ("Nabcor") brought an action in 1974 against 2 Better Business Bureau defendants ("C" suit, now) and another person in the Eastern District of New York, and Judge Griesa requested that the other federal judge transfer the new action to him, which was done. At the request of the parties, Judge Griesa severed the original action into 4 actions, of which this "GM Action" (the "A" action) was tried first. The other 3 actions (B, C & D) against various newspapers as to the 15% discount given ad agencies; various newspapers, Better Business Bureaus, a former BBB official and a bank; and Ford, Chrysler, American Motors and 3 Ford dealers, are still in pretrial, and the ultimate outcome of this petition will

determine whether Judge Griesa is to continue on such cases, as well.

Seven of the 10 defendants in this action, including GM and GMAC, made no summary judgment motion as to the § 1 claim, and Judge Griesa denied the summary judgment motions of defendants Batt Buick, GM Chairman Donner and GM President Roche.

The trial commenced October 6, 1976 with an evidentiary hearing on the preliminary question of admissibility of co-conspirators' statements against the GM Defendants, and after a 7-day evidentiary hearing, Judge Griesa held that the hearsay testimony was inadmissible, saying that plaintiffs did not prove the existence of an illegal conspiracy by a preponderance of the evidence. Immediately thereafter, on October 20, 1976, a 22-day jury trial commenced, ending November 29, 1976, immediately after plaintiffs rested, followed by 4-5 days of argument of defendants' motions for a directed verdict, ending December 6, 1976, with a directed verdict against all 8 plaintiffs and

in favor of all 10 defendants.

Plaintiffs appealed, and the judgment was affirmed by the Second Circuit, and plaintiffs' motion for rehearing was denied by the 2-judge panel and en banc.

3. Statement of Facts

A. Motions for Mistrial and to Recuse District Judge under 28 U.S.C. §§ 144, 455 - Unknown Recent (and His Firm's Continuing) Representation of GM in Related Litigation

On 11/23/76, the 27th day of the 34-day trial, Maiorana learned from his attorney (who was just informed by an associate of Davis Polk & Wardwell) that the firm represents GM, and represented GM when Judge Griesa left the firm as a partner and came as a judge to the Southern District and was assigned this action, prior to 10/72.

Several months earlier, plaintiffs' attorney had learned that Davis Polk had represented GM in a major antitrust suit ending in 1953, 23 years before, but plaintiffs' attorney believed such representation of GM had been moved to Paul, Weiss,

prior to its celebrated Nader investigation in the 1960's and plaintiffs were not even told about this 1953 GM representation by Davis Polk until 11/23/76.

Immediately, during this 27th day of trial, plaintiffs' counsel told Judge Griesa what he had just learned and asked Judge Griesa to declare a mistrial and recuse himself. The oral motion was denied.

Judge Griesa admitted these facts and he worked personally on a GM matter, "unrelated to this litigation" he claimed. GM's attorneys then stated (and Judge Griesa agreed) that Davis Polk represented the Salary and Bonus Committee (top management) of GM or GMAC and referred to a document not delivered to or seen by plaintiffs' counsel, which GM's attorneys said should have been produced by them (but was not, after repeated demands) indicating that Davis Polk were attorneys for the GM Committee. Plaintiffs renewed their recusal motion. From the bench, Judge Griesa denied the renewed motion, saying that none of his GM representation prejudiced

him. Judge Griesa said he remembered that the recusal issue had arisen somewhere, but this was not of record or when plaintiffs or their counsel were present.

Although Judge Griesa stated his firm did some work for GM or GM directors, or entities connected with GM at times, his firm represented GM in 1974 in Automobile Dealer Franchise Act (15 U.S.C. § 1222) litigation, in the Southern District (74 Civ. 2929) when Judge Griesa was denying Nabcor's motion to represent GM's franchisees as a class action against GM.

Two trial days later (on the 29th day of trial), on 11/29/76, Maiorana (who lived in Philadelphia and commuted to New York City for each day of trial) executed and filed an affidavit under 28 U.S.C. § 144 with accompanying certificate describing the above relationship (excluding the 1974 suit) and stating that plaintiffs and counsel were unaware of such GM representation by the judge and his former firm, and that no disclos-

ure was ever made by the judge or defendants' counsel (although they knew); that this action is atypical and could result in a finding that GM's distribution system is illegal; that Judge Griesa repeatedly called Maiorana a liar and this case a "thin tissue of lies"; that plaintiffs' attorney is either incompetent or wilfully misleading the court; that plaintiffs' witness was an embezzler (the judge lacking knowledge of industry practices); that Judge Griesa failed to permit plaintiffs to call GM as a witness in a critical part of the case, relating to fleet and retail allotments and delivery delays (to prove unreasonableness of restraint); that he had vacated numerous discovery requests and prevented plaintiffs from obtaining needed information from GM and other defendants; had failed to take into account the differing economic abilities of plaintiffs and GM; and during the trial he took over questioning and attempted to, or succeeded in, getting witnesses Dillon, Urso and Strimple to change testimony which favored plaintiffs.

Judge Griesa made no statement about the affidavit, other than denying the recusal motion, and he did not state the affidavit was filed belatedly.

Throughout the trial, Judge Griesa displayed an obvious bias against plaintiffs and their counsel, saying: "I am fast coming to the point where I know what the situation is, and we ought to impanel the jury tomorrow"; "...the proof is overwhelming that these allegations by the plaintiffs ... have been rebutted so virtually dramatically by documents, credible evidence, by evidence so far exceeded in credibility than that of the credibility of the plaintiffs' witnesses, it is dramatic. I'm talking about the credibility and believability of the witnesses you put on and ... their testimony ... is simply a tissue of lies"; "Everytime we have gone into depth on any particular episode the testimony of the witnesses by the plaintiffs has been proved to be just absolutely untrustworthy to a remarkable degree." "I have sat

in this court for a little over four years ... and I really have seldom seen witnesses who are so lacking in credibility"; "This man either has a very fertile imagination or he is a very dishonest individual..., ... there is a great opportunity for abuse of the processes of the court unless something is done"; "If I were on the jury it would be devastating to have these explanations come in, devastating to the plaintiffs' case. I guess one piece of strategy for the defense side would be to let Maiorana string himself out, you know, go out on the longest, thinnest, limb they can find, and then simply cut him off. So far they have succeeded in doing that. That's ... what has happened"; "...if this ever happened, and I am not sure it ever happened"; "I don't think you are" "willing to explore everything" (said to plaintiffs' counsel); "We cannot go week after week with the plaintiffs' witnesses testifying with their severe problems of credibility"; "the chances are very great that his story about '67 won't hold up"; "I think it is

virtually tragic to have a long complicated trial over a case that will end up worth ... a few thousand ... It is just really a piece of silliness as far as the court is concerned"; "...the damage claims are so appallingly fictitious..."; "the imposition that you and your attorney are perpetrating on this Court by coming forward with damage claims and other claims which are proving to be more and more fictitious and groundless"; "You have the most aggravated credibility." "I assume there will be a motion to dismiss at the end of plaintiffs' case, right?" MR. KAPLAN: "Yes, sir."; "I heard for weeks about 44 orders placed to Colonial Cadillac, absolute bunk ... Just bunk"; "This litigation is the biggest waste of business I have ever experienced"; "I never read (Nabcor's) ... pretrial memorandum thoroughly. ... I read some of it...."; "Either you don't know the case or else you are intentionally misleading the Court; it is one or the other. I am somewhat inclined to the latter view, and you must stop it"; "The only reason they

had trouble getting the cars was that they were 'embezzling' the deposit money"; "You get these witnesses on the stand and have them tell the truth, or there is going to be a lot more trouble than losing this case"; he read from the perjury section of the Criminal Code and said "...I must state, Mr. Person, that your witnesses have given me the reason for speaking in the terms I have done.... I make no bones about that"; "false testimony and false statements"; "Maybe my memory fails me, but certainly his testimony was another clear-cut example of somebody who was committing some surprising tricks under oath in this court"; "These witnesses absolutely expand and contract as the sun moves through the sky. I never simply have seen such a totally unreliable group of people"; "How much more of a trial does this case require?"; "I don't see any reason to have another three weeks of witnesses about matters where there are no damages that anybody can even talk about. It may be that a motion to dismiss the entire case would

be granted"; "I don't imagine it really happened this way"; "I believe it is quite possible that the plaintiffs will fail in their proof on the basic facts"; "I have not heard a lick of evidence"; "This is an example of the ever shifting claims and contentions of the plaintiffs' side"; "...I assume there will be motions to dismiss?; "...I just have a deep distrust based on experience in this case for that kind of evidence"; "That is a good story if it holds up, but I heard that kind of thing before"; and "... this is a strategy to take care of the inevitable strength of the statistical materials of General Motors".

Also, during pre-trial proceedings, Judge Griesa denied all but 6 of plaintiffs' 74 document production requests; sua sponte vacated plaintiffs' notice of deposition of 29 GI and GMAC officials for depositions of 1/2 day or less, even though defendants had lasted far longer with theirs; vacated all of plaintiffs' 7 sets of interrogatories; twice refused plaintiffs' request to turn

discovery problems over to a magistrate; would not order defendants to identify each oral communication they had about Nabcor even though the judge was aware he had vacated plaintiffs' notice to depose many of the same officials or even as to specified GM-GMAC officials; would not permit plaintiffs to serve interrogatories without clearing them; vacated plaintiffs' interrogatories concerning the then recent firing by GI of all its employees in the New York Zone; denied plaintiffs' motion to enjoin further solicitation by GI's attorneys of Nabcor's franchisees to have them bring civil and criminal proceedings against Nabcor and Maiorana, to use as fabricated evidence in the class-action motion, and to stop GM-GMAC from participating in any other armed robbery of Nabcor's records, which Judge Griesa denied without reading; refused to allow plaintitffs to take oral depositions on written questions under Rule 31, F.R.Civ.P., knowing of plaintiffs' poor financial condition; denied all discovery on plaintiffs' §2, Sherman Act claims;

refused to order GI to produce policy documents concerning GI's warranty program and destination charges; quashed each of plaintiffs' trial subpoenaes; asked to speak with GI's 4 attorneys before trial in absence of plaintiffs' counsel; sua sponte requested a federal judge in an adjoining district to transfer to Judge Griesa an action filed by Nabcor in 1974 against 2 of EBB defendants and another; and put plaintiffs through financial burdens of 2 trials (including the evidentiary hearing) and refused to salvage this double trial by submitting the case to the jury (but permitted 4-5 days of argument on the directed-verdict motions.

Pretrial with Judge Griesa resulted in plaintiffs' obtaining no evidence from GI-GMAC to prove plaintiffs' claims in the warranty, mandatory destination-charge and other parts of the action (and being unable to get valuable evidence as to the matters actually tried).

B. Argument before Second Circuit Panel Including Disqualified Circuit Judge; Decision by 2-Judge Panel

Argument on the appeal in the Second Circuit was held December 6, 1977, before Circuit Judges Mansfield, Smith and Moore, as a "hot court". Three months later, several days before the March 20, 1978 opinion was released by Circuit Judges Mansfield and Moore, plaintiffs' attorney was advised by the 2-judge panel that Judge Smith had disqualified himself; plaintiffs' attorney requested that a successor 3rd judge be appointed; and Judge Mansfield's clerk told plaintiffs' attorney that he did now know the reason for Judge Smith's disqualification. Judge Smith's office reported the following week (to an inquiring reporter) that his disqualification was "a question of stock ownership", a clear reference to ownership of GM stock. Plaintiffs' motion for reargument and request for a new panel was denied, after 6 months. Appendix G is a copy of an unanswered letter from plaintiffs' attorney to Circuit Judges Mansfield,

and Smith and Chief Judge Kaufman requesting information about the disqualification.

Previously, on April 29, 1977, Judge Smith had written an opinion in Person v. The Association of the Bar of the City of New York, et al., 554 F.2d 534 (2nd Cir. 1977), cert. denied, ___ U.S. ___ (1977), overruling District Judge Dooling's decision and judgment declaring unconstitutional the ABA Disciplinary Rule 7-109(c) prohibiting use of expert witnesses on a contingent-fee basis. Plaintiffs' counsel herein had sued to be able to use such expert witnesses in this Nabcor Action. Thus, Judge Smith was aware of the parties to this action when he heard the argument only 7 months later. The stock ownership question arose either before or after the Nabcor argument herein. If after, it would appear that there was a wilful disqualification; if before, he knew he was disqualified at the time of argument.

Section 0.14(b) of the Second Circuit Rules does not permit a 2-judge panel in the event of either of these two possibilities.

C. Directed Verdict - Judge Griesa's Opinion

The evidence proves that Nabcor was effectively destroyed by early 1967, through the conspiratorial acts (i) preventing plaintiffs from filling specific car orders by refusals of GM dealers to deliver ordered cars; (ii) and loss of specific car orders by customer cancellations caused by inordinate and unexplained delivery delays or by reorders after Nabcor's accepted orders were turned back. Nabcor was made financially unable to provide contractual services to its franchisees, causing a loss of Nabcor's franchisees. After early 1967, Nabcor's car orders became insignificant (about 1 per week). Judge Griesa concentrated on this post-destruction era when Nabcor had far fewer delivery difficulties.

Judge Griesa's opinion is wholly erroneous in its discussion of the admitted evidence, as follows (appendix page numbers indicate the erroneous discussion:

(5a) Judge Griesa obviously did weigh the

credibility of plaintiffs' witnesses (see 22-26, supra) to reach his "one reasonable conclusion". (7a) General's request to buy 200 cars from a Buffalo Chevrolet dealer was stopped by the GM Zone manager who said GM would not supply the cars; Nabcor's 44-45 orders at Colonial Cadillac were not delivered because GM refused to give Nabcor the fleet certificate requested by Colonial during 1966; dealers testified they needed fleet allotments to sell to Nabcor and Nabcor's admitted disqualification resulted in refusals by dealers to fill Nabcor's orders (Ruckle, Colonial and others). This is the "whitelist" theory: that GM dealers were artificially limited in the number of retail cars they could buy and were thereby forced into asking permission of the GM Fleet Section to sell cars on a quantity basis to any purchasers; GM refused to issue the "fleet certificate" or grant a "fleet allotment" to companies such as Nabcor not approved by GM as "fleet purchasers".

(17a) "certain inherent problems" is wrong:

Nabcor could always find new dealers willing to order cars for Nabcor, but most subsequently refused to deliver, or accept new orders; GM Zone officials told Nabcor they would see that Nabcor got no cars (Gray, Speece, English); some dealers were always willing to sell to Nabcor for the small markup involved; if they didn't others would and did; only GM could stop GM dealers from selling to Nabcor.

Plaintiffs' "blacklist" argument is based on instances where defendant dealers told Nabcor or General that GM officials had told them not to sell any cars to Nabcor or General, whether at fleet or retail prices. (17a) GM dealers were willing to sell even 1 car to Nabcor on a "fleet" basis, hoping to sell more. (18a) Nabcor's customers could look at specific cars in GM dealers' showrooms.

Nabcor's system generated less business than contemplated (19a), the result of the alleged conspiracy, which interfered with Nabcor's orders; made Nabcor's business unprofitable; interfered with Nabcor's contractual relationships with its

brokers; this made Nabcor unable to give its brokers the advertising, legal backup, marketing programs, training, motivation, supervision promised. (20a) crippling of Nabcor crippled Nabcor's brokers, who were dependent for support services and on-time delivery of ordered cars. (21a) the 3rd activity is the inordinate delivery delays, causing customer cancellation, if the GM dealer had not already refused to deliver. (21a) General was prevented in 1967 from setting up even 1 source of supply in Buffalo by a 100% boycott by GM dealers and dealer association, causing General to go broke; later, in 1968, when General had no assets and only 1 franchisee to service (plaintiff Young) General could get the small number of cars it wanted in Buffalo, but only by pretending to order for GM fleet-certificate holder Econo-car, with the knowledge and connivance of defendant dealers.

(22a) Nabcor obtained 160 orders during 9/12/66 and delivered only 70 cars. Ninety orders

were lost, resulting from delivery refusals (including 38 Cadillac orders) and customer cancellations caused by inordinate delivery delays; plaintiffs specified about 100 transactions interfered with, mostly in the period ending in early 1967. (23a) Paragon refused to deliver in late 1966 the few cars ordered by Nabcor and told Nabcor in 1966-67 that Paragon could not sell then to Nabcor because the GM Zone was shutting Nabcor off all over the place because Nabcor has no fleet certificate.

(24a) Nabcor's log lists 44 orders to Colonial Cadillac ending early 1967, which was read to the jury; Maiorana testified he placed the orders, and Colonial testified they threw away unfilled orders after 2-3 months; Colonial even offered to fill some of these orders with 2 cars in inventory; the Justice Department request for documents came after Colonial's disposal of the Nabcor orders.

(24a) GM did not use its own records of its dealings with GM dealers in compiling the statistics, contrary to the court's direction.

(25a) High GM officials were aware that Nabcor was having difficulty because of dealer refusals to order or deliver, delivery delays, and GM dealers' unwillingness to sell to Nabcor unless it had a fleet certificate; and that GM was telling dealers not to sell to Nabcor. GM "corporate" response was that it had no control over the GM Fleet Section, which had the sole authority over the fleet certificate, as to each of the 5 motor-car divisions. Chairman Donner testified he never head of the GM "fleet allotments". Thus, the "corporate officials" were the GM Fleet Section heads, each of whom testified and was responsible for publication of the National Account List of GM fleet certificate holders, as a "whitelist" of GM-approved fleet customers for GM dealers; otherwise, the GM dealers were limited to their artificially-limited "retail allotment", an unreasonable and manipulative scheme designed to keep retail prices high as to customers not approved by GM for fleet purchases.

(25a) because Nabcor had no fleet certificate (i) one GM dealer refused to make a 200-car commitment to General, GM having refused to supply the cars to the dealer; a Nabcor car being delivered to Kline Pontiac was diverted by Pontiac; inordinate delivery delays existed with 50% of Nabcor's orders, and 83% of the inordinate delays were for more than 63 days at Rohrer, which testified it never delayed sending in the Nabcor order or delivering the car to Nabcor; one Nabcor car was taken by GM off the Buick dealer's floor, the only time in 20 years.

(25a) The GM President and Board Chairman were advised by Nabcor that the Buffalo Zone was telling dealers not to sell to Nabcor and General, but the Nabcor problem was referred to the Fleet Section, which did nothing, even though it had documents explaining what was happeding; the Fleet Section asked Nabcor for information it already had from the Zone and which Maiorana already gave, as an apparent reason for failing

to act upon Nabcor's repeated complaints. GM wanted a list of Nabcor's GM dealers, which Nabcor refused.

(26a) The GM motorcar divisions are tied together by the Fleet Section; a concurrence of refusals in various New York GM zones during late 1966 with refusals by Midtown Chevrolet, Ruckle Pontiac, Luby Chevrolet and various others.

(28a) Judge Griesa concentrates on the last 3-1/2 years when Nabcor was effectively out of business; and refuses to consider the delays as part of Nabcor's refusal problem; (29a) Many times Nabcor had to reorder cars refused delivery, and in some cases the subsequent orders were also refused delivery or delayed, or customer-cancelled for lateness. (32a) deals with the last 3-1/2 years of period when Nabcor averaged 1 car order per week from all 148 brokers; even then, Nabcor still suffered cancellations from delays and a small number of refusals to deliver.

(37a) By 1967-8, Nabcor learned it could not

obtain Cadillacs and stopped encouraging brokers to submit Cadillac orders; even then Nabcor only got about 55-60% of the Cadillacs ordered, with substantial title-hiding problems by dealers who did not want the GM Zone to see to whom the Cadillacs were being sold.

(38a) In 1967, General could not obtain any GM sources in Buffalo and ran out of capital by early 1968, when he was first able to order a limited number of cars; in 1967, General had the capital to turn over at least 200 cars per year.

(40a) Judge Griesa assumes that for destruction of a business Nabcor must not be able to get any cars, and that substantial interference through delivery refusals and a substantial number of substantial delivery delays, resulting in broker and customer dissatisfaction and customer cancellation are not actionable. A jury would reasonably find otherwise. Nabcor's management devoted much time looking for new sources of cars and pacifying customers and Nabcor brokers

because of the repeated losses of its sources and reordering of previously ordered cars; a substantial drain on any thinly capitalized business. Nabcor's initial capitalization was $35,000.

(41a) Evidence was admitted that GM officials told Nabcor that Nabcor would not be able to get any GM cars, and this became true as to some dealers, particularly through the outright refusals, refusals to deliver specific cars; and unexplained, substantial delivery delays (resulting in customer cancellations prior to dealer refusals to deliver).

(46a) Midtown told Nabcor that it was refusing to honor the Don Allen contract with Nabcor because Midtown's function was to keep retail prices high, even at a loss, so that customers would be forced into buying their cars at retail from GM's outlying dealers, including ones which refused to deal with Nabcor. This was price-fixing, unquestionably. Nabcor lost some of its customers because of the Midtown delays, and had to reorder the cars for

the customers which had not yet cancelled from another GM dealer, with inevitable delivery delays and cancellations by other customers; this occurred while Gray of Pontiac Zone said Nabcor would get no Pontiacs because it had no fleet certificate; and Ruckle refusing to deliver the ordered Pontiacs shortly after the Pontiac official met with Ruckle; and Ruckle himself was giving up his own auto brokerage business; Ruckle had previously offered Maiorana $500,000 for 2/3's of Nabcor. (47a) GM-Midtown had no right to prevent performance of timely deliveries under Nabcor's order contract with Midtown's predecessor; Midtown-GM assumed the obligations under law.

(50a) A.C. Chevrolet shows A.C. wanted to deal with Nabcor, but could not get the cars from GM and delivered demonstrators, instead.

(50a-51a) Shows maximum of 14 customer cancellations due to late deliveries by Chevrolet dealers.

(52a-53a) the Ruckle orders returned were

marked as retail orders; previously Ruckle changed its ordering method from "fleet" to "retail" around the time of the visit to Ruckle by the high GM (Pontiac) official, who was derogatory about Nabcor; (54a) Nabcor lost some of the Ruckle orders through customer cancellation for delays, including the reordering delays.

(57a) Rosenstock was not a defendant, and his reason for refusing to deliver, as told to Nabcor, was not admitted.

(67a-68a) The fleet certificate is GM's means of selling directly to persons and bypassing GM's own dealers, and preventing GM dealers from selling to persons not approved by GM, to fix retail prices and force boycotts of auto brokers such as Nabcor; also, this permits GM to charge lower prices to certain GM customers (with such sales made on a token "fleet" basis through one of GM's thousands of GM dealers, in what amounts to a customer allocation scheme in aid of the scheme to fix retail prices at higher levels.

The relationship between fleet certificates and fleet allotments was clear from the evidence.

(69a) After Gray referred to Nabcor as "bootlegger", Ruckle refused to deliver the orders.

(70a-71a) Fleet certificates were the successor to the old "fleet agreement", under which GM-approved fleet purchasers agreed with GM not to resell the cars, and that the fleet certificate was often referred to by the GM Fleet Section as a "fleet agreement", an error resulting from the similarity in purpose between the two, that purchasers on a "fleet basis" were prohibited by GM from reselling them at retail; a restriction designed to hinder Nabcor-type companies, and in violation of the court's injunction in United States v. General Motors, 384 U.S. 127 (1966), which prohibited GM from interfering with discount sales of Chevrolets by discount houses and others anywhere in the United States.

(72a) Sales of cars after Gray and McNamara incidents were only the delivery of cars already

ordered by Nabcor; the Ruckle refusals to deliver occurred 3 days after the McNamara visit to Ruckle.

(78a) Also, the visit was prompted by a zone memorandum that the Chevrolet dealers in Philadelphia should be alerted that Nabcor has no fleet certificate, and therefore should not be sold cars.

(78a) Nabcor was having extended delivery delays at Rohrer, caused by GM's interference with Rohrers' "fleet" orders for Nabcor, changing them to "retail" orders.

(79a-80a) The GMAC manager had not approved the financing application; he had recommended approval to higher ups, who refused to approve the application and asked for Nabcor to guarantee GM's loan to the dealer, which was to be fully-secured by the GM dealer and collateralized by the subject cars.

(82a) Various GM officials told Nabcor that it would not be able to get cars from GM dealers for resale; and that Nabcor should not be reselling cars, and Roche so testified.

(84a) the delay problem was not a "fallback" problem; it was an integral part of the continuum of (i) outright refusal; (ii) acceptance of Nabcor orders and refusal to deliver all or some of the ordered cars, followed by an outright refusal to deal any further; (iii) extended delays on delivery of ordered cars resulting in non-delivery through Nabcor customer cancellation; and (iv) loss of Nabcor's broker and Nabcor's goodwill because of this interference with Nabcor's business.

(84a) Delays by GM dealers should average 28 to 30 days; Nabcor's manual said 4 to 6 weeks (or 28 to 42 days), but this was written when Nabcor had already experienced substantial delays and was litting Nabcor's brokers know how long <u>in fact</u> it was then taking for Nabcor to get cars, from the 4 different manufacturers, on the average, presumably.

(85a) Nabcor's evidence was that 50% of its car orders were delivered after 40 or more days,

even though the average delivery time was only 28 to 30 days. The Nabcor delays were the rule.

(87a) Nabcor's financial statements showed $12,000 in cash on 1/31/67; a deficit of $143,765; gross profits of $9,000 on its 160 orders for fiscal 1967, ending 1/31/67; and Nabcor fired in 12/66-1/67 all but 3 of its 50-60 employees because of the interference with Nabcor's business. Without increases in car sales, Nabcor could not survive (except temporarily on its franchise income); these increases never came, because of the interferences; Nabcor lost hundreds of specific orders during the whole period and its growth was stifled.

(88a) Plaintiffs testified about how Nabcor's critical financial condition affected Nabcor's brokers adversely, preventing them from obtaining needed support services promised to them by Nabcor.

(91a) Individual plaintiffs testified about their loss of value in Nabcor stock due to Nabcor's destruction.

REASONS FOR GRANTING THE WRIT

Petitioners submit that this Court should grant this petition for the following reasons:

(i) The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court (issues I and II below).

(ii) The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court (issue III below).

(iii) The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision (issues I and II below).

I.

The district judge, biased or not against plaintiffs, should have recused himself under 28 U.S.C. §§ 144 or 455 when, during an extended antitrust trial with GM, GMAC, GM President and GM Chairman as principal defendants, petitioners first learned that the judge and his former law firm represented (and the firm continued to represent) GM, GMAC, GM directors, and a top GM management committee in antitrust and related areas immediately before he became a district judge and was immediately assigned this action, without disclosing this relationship (which was known at all times to the GM defendants' attorneys).

II.

The 2-judge panel, which decided this appeal after the hearing before a 3-judge panel including a disqualified judge known to be such, was itself disqualified by its failure to appoint a successor 3rd judge to rehear argument and participate in

the review of the record and rendering of the Court of Appeals' decision.

III.

The courts below erred when directing (or affirming) a verdict against petitioners and holding there was insufficient evidence to support any jury finding of illegal group boycott ("blacklist") or illegal "whitelist" by any of the 10 defendants as part of an horizontal agreement to fix the retail prices of new cars and prevent competition by "auto brokers".

I. - Discussion

Judge Griesa should have disqualified himself under 28 U.S.C. § 144. The affidavit was sufficient, alleging specific facts for anyone reasonably to conclude that the judge was biased against plaintiffs for the extra-judicial reason of prior representation of GM, GMAC and top management thereof by Judge Griesa and his firm, and his

firm's continuing representation. The representation was in the antitrust, dealer litigation and GM top management areas, where Judge Griesa's decisions in the Nabcor Action could substantially and adversely affect GM and his former firm; Judge Griesa's decisions in the Nabcor antitrust action could be in conflict with advice rendered to GM by the firm during Judge Griesa's presence as partner (creating possible malpractice liability for the firm members and Judge Griesa himself); and the information which came to the firm's attention to render its advice could have prejudiced Judge Griesa. This information is imputed to Judge Griesa, see SCA Services, Inc. v. Morgan, 557 F.2d 110, 114 (7th Cir. 1977). In fact, his firm was named on a document which GM's attorneys failed to produce to plaintiffs (for the apparent purpose of hiding the relationship between Judge Griesa's firm and GM from plaintiffs' counsel). It is difficult to see how anyone advising and defending GM in antitrust

matters could not obtain material information relevant to an antitrust suit brought against GM attacking its franchised system and distribution methods. Defendant (GM President) Roche had already testified that GM's business was delicately balanced, and that tampering with any of its parts (by Nabcor's competition with GM's dealers) would seriously affect these other parts of GM (including salaries and bonuses for top management, GM's relationships with its dealers).

Thus, Davis Polk and Judge Griesa had knowledge about various parts of GM, a knowledge of facts relevant and possibly relevant to (i) the Nabcor §§ 1-2, Sherman Act action, (ii) Nabcor's class-action motion to represent the GM dealers, (iii) Nabcor's effect on GM's business, and other relevant matters. Representation of a defendant in an antitrust suit should bar the lawyer from representing an antitrust plaintiff against the same defendant or from acting as a judge in a case against the defendant and

former client. Also, Judge Griesa's and Messrs. Paul, Weiss' failure to advise plaintiffs about this representation of GM gave plaintiffs ample justification for requesting Judge Griesa's recusal under 28 U.S.C. §§ 144, 455 - under the appearance of impropriety test. See Canon 3C(1) of the Code of Judicial Conduct for United States Judges.

Also, Judge Griesa's recent departure as partner from the Davis Polk firm gave rise to the reasonable belief that he had a continuing interest in the firm when he was first assigned the Nabcor action and, therefore, (i) the firm's continued representation of GM and (ii) avoidance of rendering any antitrust decisions which would make his form's advice malpractice or suspect.

The § 144 affidavit and certificate were filed on a timely basis, on the 2nd day in court (6 actual days) following the oral motion to recuse, and Judge Griesa did not state the affidavit was filed belatedly.

Prior to commencement of trial a 5-day delay was not untimely. United States v. Townsend, 478 F.2d 1072 (3rd Cir. 1973). The 6-day (i.e., 2-trial-day) delay was with reasonable diligence, considering the difficulties of an individual practitioner in a major antitrust suit at trial, having to remain in the courtroom during the whole day and prepare for succeeding trial days; with his principal client in New York City only for each trial day; the necessity to research the law and draft the needed documents, including a look at parts of the massive record; and the fact that the issue was raised orally in court immediately after the facts became known make the filing of the affidavit of bias in 2 trial days a filing with reasonable diligence. Bradley v. School Board of City of Richmond, 324 F.Supp. 439 (D. Va. 1971); Hall v. Burkett, 391 F.Supp. 237 (W.D. Okl. 1975).

No plaintiff was aware of GM's representation by Judge Griesa or his former law firm until

minutes before the oral mistrial and recusal motion was made, and plaintiffs' attorney was also unaware, except he knew (without mentioning such fact to his clients) that Judge Griesa's former firm had represented GM for an unknown period ending 23 years earlier, a fact clearly insufficient to obtain a recusal. Also, it was unknown that Judge Griesa had been a partner in Davis Polk when it represented GM. Plaintiffs' counsel reasonably believed that the GM representation was taken over by the Paul, Weiss firm in the 1960's or earlier, no later than Paul, Weiss' representation of GM in the celebrated Nader investigation and public apology by firm partner Schlesinger.

In light of the foregoing, under old § 455, Title 28 U.S.C., Judge Griesa had a "substantial interest" (possible malpractice liability; continuing interest); and he was "so related to or connected with any party or his attorney as to render it improper, in his opinion"

(subject to abuse of discretion test) "for him to sit on the trial" (possible malpractice liability; knowledge of disputed facts; continuing interest in the firm's profits, or appearance thereof to plaintiffs).

Under amended § 455, effective prior to commencement of the trial and before severance of the GM Action, Judge Griesa should have disqualified him under (a), where his impartiality might reasonably be questioned, United States v. Ritter, 540 F.2d 459 (10th Cir., 1976), cert. denied, 429 U.S. 951; (b)(1) a personal bias or prejudice for extrinsic reasons and knowledge of disputed facts; (b)(2) his law firm represented GM in related antitrust matters; (b)(4) financial or other interest (malpractice liability, continuing interest in partnership profits).

II. - Discussion

As a so-called "hot court", each of the judges has read the briefs and possibly parts of the record before hearing the argument. Whether a "hot court" or not, the argument itself is of fundamental importance to all of the parties. If a judge has any questions about the case he can obtain immediate answers from the appellants' or appellees' attorneys in an adversary setting, and can make his decision based on this and other information. Also, inquiries from a single judge can help the other members of the 3-judge panel come to a proper decision. It is assumed that the panel has not already decided a case before the hearing takes place.

However, if a judge is disqualified to serve as a judge on the 3-judge appellate panel for any reason at the time of argument, the 3-judge panel ceases to be able to function in the intended way; the value of having 3 non-disqualified judges is lost; and the parties are denied due process.

Judge Smith removed himself, 3 months after having heard oral argument, because of a reported question of stock ownership, presumably GM stock (the only other public company not a subsidiary of GM was appellant Mabcor).

As a consequence of his sitting in on the argument while he was (apparently) disqualified for some reason, appellants were deprived of a qualified judge. If the panel had included a third (qualified) judge, this could well have resulted in a change in outcome of the case (even if the 3rd judge merely listened to the tapes of the appellate argument, but to a lesser extent). For example, the third (qualified) judge could have had a greater interest in the case or perhaps a better insight to the issues. Also, he could have affected the ultimate outcome in the 3-judge panel, in the requested en banc proceeding or in this Court, by the filing or threat of filing of a dissenting opinion; also, disqualification only days before the decision came down indicates

the possibility that he disqualified himself after a decision had already been reached, creating an appearance of impropriety necessarily disqualifying the whole panel under 28 U.S.C. § 455.

Accordingly, the value of the 3-judge panel was lost to the appellants; the hearing was not according to due process; and the matter should be transferred back to a new 3-judge panel for reargument. Under § 0.14(b) of the Second Circuit Rules it would appear that appellants were entitled to such a new panel:

> "(b) Unless directed otherwise, a panel of the court shall consist of three judges."

The quoted sentence above read in conjunction with the underscored part of the Rule at p. 10 supra clearly mean that a panel should consist of 3 judges none of whom at the time of argument or at the making of the decision is disqualified. The rule was obviously intended to cover only a non-wilful disqualification subsequent to the argument.

III. - Discussion

Reasonable persons not only could reach a different conclusion from the admitted evidence, but few reasonable persons would have decided the case against plaintiffs. Judge Griesa and the Second Circuit erred in their application of Epoch Producing Corp. v. Killian Shows, Inc., 522 F.2d 737, 742-43 (2nd Cir. 1975), cert. denied, 424 U.S. 955 (1976). Also, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

Also, Judge Griesa's bias and refusal to recuse himself must be taken into consideration when looking at plaintiffs' evidence; a judge not disqualified would have permitted plaintiffs use of the discovery rules to provide far more evidence, and would have decided the directed-verdict motions in favor of plaintiffs.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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